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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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12 TRUE CAPITAL MANAGEMENT, LLC,
13 and TAMARA JARIC,
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15 Plaintiffs,
16 v.
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18 UNITED STATES DEPARTMENT OF
19 HOMELAND SECURITY, and UNITED
20 STATES CITIZENSHIP AND
21 IMMIGRATION SERVICES,
22

23 Defendants.

24 Case No.: 13-261 JSC
25

26 **ORDER GRANTING DEFENDANTS'**
MOTION TO DISMISS FOR LACK
OF SUBJECT MATTER
JURISDICTION (Dkt. No. 13)

27
28 Plaintiffs True Capital Management (“True Capital”) and Tamara Jaric filed this action
seeking declaratory relief and an order compelling Defendants United States Department of
Homeland Security (“DHS”) and United States Citizenship and Immigration Services
 (“USCIS”) to approve the H-1B visa petition submitted by True Capital on behalf of Tamara
Jaric. Now pending before the Court is Defendants’ Motion to Dismiss for Lack of Subject
Matter Jurisdiction (Dkt. No. 13) based on USCIS’s sua sponte reopening of Plaintiffs’ H-1B
petition during the pendency of this action.

1 Plaintiffs appeared for oral argument on May 16, 2013, although Defendants did not.
2 At oral argument, Plaintiffs argued that Defendants' reopening was merely for the purpose of
3 delay. Plaintiffs were granted leave to submit supplemental briefing regarding this argument
4 and Defendants were directed to respond to said supplemental briefing. (Dkt. Nos. 23 & 26.)
5 The Court has considered the parties' moving papers, supplemental submissions, and the
6 relevant legal authority and GRANTS Defendants' motion without prejudice.

7 **BACKGROUND**

8 Plaintiff True Capital filed a Form I-129H petition with USCIS seeking to temporarily
9 employ Plaintiff Tamara Jaric through an H-1B visa on April 9, 2012. An H-1B visa petition
10 is authorized by statute, 8 U.S.C. § 1101(a)(15)H(i)(b), and allows an employer to
11 temporarily employ a non-immigrant as a "specialty occupation" worker; here, a Business
12 Marketing Specialist. True Capital is a San Francisco based wealth management company
13 specializing in wealth management services specifically designed for professional athletes,
14 entertainers, and other high net worth individuals. Ms. Jaric was lawfully present in the
15 United States on an F-1 student visa at the time the petition was filed.

16 In response to the visa petition, USCIS issued a Request for Evidence ("RFE") seeking
17 additional documentation supporting True Capital's contention that the Business Marketing
18 Specialist position offered to Ms. Jaric qualified as a "specialty occupation" requiring a
19 Bachelor's degree, or its equivalent, in a "specific specialty," which Plaintiff submitted. On
20 October 26, 2012, Plaintiffs received a Notice of Decision notifying them that the visa
21 petition had been denied because True Capital had failed to show that the proffered position
22 satisfied any of the four criteria required to be considered a "specialty occupation" under 8
23 C.F.R. § 214.2(h)(4)(iii). Plaintiffs elected not to file an appeal with the Administrative
24 Appeals Office ("AAO").

25 Plaintiffs thereafter timely filed the underlying complaint seeking declaratory relief
26 and a determination that USCIS's decision to deny the visa petition was arbitrary and
27 capricious. While this action was pending USCIS sua sponte reopened Plaintiffs' visa
28 petition and sought additional evidence; namely, a copy of Plaintiff Jaric's college

1 transcripts.¹ (Dkt. No. 13-1.) Defendants then filed the underlying motion to dismiss for
2 lack of subject matter jurisdiction. (Dkt. No. 13.) Just over a month later, USCIS sent
3 Plaintiffs a third Request for Additional Evidence which appears identical to the preceding
4 request. (Dkt. No. 23-6.) The deadline for Plaintiffs to submit the additional evidence is
5 August 1, 2013. No other decision has issued from USCIS regarding Plaintiffs' visa petition.

6 **LEGAL STANDARD**

7 “Federal courts are courts of limited jurisdiction.” *Kokkonen v. Guardian Ins. Co. of*
8 *America*, 511 U.S. 375, 377 (1994). It is therefore presumed that a claim is not within the
9 jurisdiction of the federal court “and the burden of establishing the contrary rests upon the
10 party asserting jurisdiction.” *Kokkonen*, 511 U.S. at 377; *see also St. Clair v. City of Chico*,
11 880 F.2d 199, 201 (9th Cir. 1989) (finding that it is “necessary for the party opposing the
12 motion to present affidavits or any other evidence necessary to satisfy its burden of
13 establishing that the court, in fact, possesses subject matter jurisdiction”).

14 **DISCUSSION**

15 As a general matter, district courts are empowered to review agency action by the
16 Administrative Procedure Act (“APA”), 5 U.S.C. § 551 et seq. (2012), and have federal
17 question jurisdiction over such claims pursuant to 28 U.S.C. § 1331 (2012). In this context, a
18 court has jurisdiction to review a “final agency action for which there is no other adequate
19 remedy in a court.” 5 U.S.C. § 704 (2012); *Mamigonian v. Biggs*, 710 F.3d 936, 941-42 (9th
20 Cir. 2013); *see also Fred 26 Importers, Inc. v. U.S. Dep’t of Homeland Sec.*, 445 F. Supp. 2d
21 1174, 1178 (C.D. Cal. 2006) (“Judicial review of the denial of an H-1B visa petition is
22 governed by the Administrative Procedure Act ... §§ 704, 706”). Two conditions must be
23 satisfied for agency action to be final for purposes of the APA: “First, the action must mark
24 the ‘consummation’ of the agency’s decisionmaking process—it must not be of a merely
25 tentative or interlocutory nature. And second, the action must be one by which rights and

26 ¹ Defendants attached a copy of the March 28, 2013 “Request for Evidence,” to their motion
27 to dismiss but did not provide a copy of the notice (if any) which affirmatively reopened
28 proceedings. (Dkt. No. 13-1) The parties do not dispute, however, that the agency did in fact
reopen proceedings.

1 obligations have been determined, or from which legal consequences will flow.” *Bennett v.*
2 *Spear*, 520 U.S. 154, 177–78 (1997) (internal citations and quotations omitted).

3 **A. Finality of the October 26, 2012 Notice of Decision**

4 The critical question here is whether USCIS’s sua sponte reopening of Plaintiffs’ H-1B
5 petition renders its prior denial of the petition non-final. While neither the parties nor the
6 Court located a decision directly on point, there are several decisions which lead the Court to
7 conclude that the reopening renders the earlier decision non-final and therefore not subject to
8 review.

9 First, while not binding on this Court, in *Bhasin v. U.S. Dep’t of Homeland Sec.*, 413
10 F. App’x 983, 985 (9th Cir. 2011), the Ninth Circuit considered the nearly identical question
11 of whether USCIS’s sua sponte reopening of a plaintiff’s I-130 visa petition renders its prior
12 order denying the petition non-final. The court held that in such circumstances “the denial is
13 not a ‘final agency action’ under 5 U.S.C. § 704 and is not subject to judicial review under
14 the Administrative Procedure Act.” *Id.* (citing *Bennett v. Spear*, 520 U.S. 154, 177–78
15 (1997)).

16 In *Cabaccang v. USCIS*, 627 F.3d 1313 (9th Cir. 2010), the Ninth Circuit considered
17 the related question of whether USCIS’s denial of an application to adjust status is “a final
18 agency action” where removal proceedings have been initiated and remain pending. *Id.* at
19 1316. The court noted that in the course of the removal proceedings, the plaintiffs would
20 have the opportunity to renew their request to adjust status before the Immigration Judge
21 (“IJ”), who has “unfettered authority” to modify or reverse USCIS’s prior denial of their
22 applications. *Id.* The Ninth Circuit held that given the IJ’s ability to “wipe away” USCIS’s
23 prior decision, “USCIS’s denial of their applications is not yet final, and the district court
24 lacked jurisdiction under the APA.” *Id.*² In so concluding, the Ninth Circuit relied on its prior

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26 ² Further, it is well established in the removal context that the Board of Immigration Appeals’
27 sua sponte reopening of immigration proceedings divests the reviewing court of jurisdiction.
28 See *Saavedra-Figueroa v. Holder*, 625 F.3d 621, 624 (9th Cir. 2010) (citing *Lopez-Ruiz v.*
Ashcroft, 298 F.3d 886, 887 (9th Cir. 2002) (the BIA’s reopening of the case divested us of
jurisdiction)). “The remand for further proceedings is what caused us to lose jurisdiction.

1 decision in *Acura of Bellevue v. Reich*, 90 F.3d 1403, 1407-08 (9th Cir. 1996). There, the
2 court held that a motion for reconsideration, an appeal to a superior agency authority, or an
3 intra-agency appeal to an administrative law judge all render an agency decision nonfinal. To
4 hold otherwise, would “inappropriately interfere with the Departments’ intra-agency decision-
5 making process before it is completed” because the agency review process provides “the
6 opportunity and authority to consider, change, and eventually finalize [the agency’s]
7 position.” *Id.* at 1408.

8 Drawing on the reasoning of these cases, this Court concludes that USCIS’s reopening
9 of Plaintiff’s H-1B petition renders Defendants’ prior denial not the “final administrative
10 work” in this matter. *See Reich*, 90 F.3d at 1408. Were this not the case, the agency and the
11 Court would be simultaneously considering the same issues and the agency’s prior
12 determination could change at any time wholly undermining the purposes of the finality
13 doctrine. *Id.* at 1409 (“simultaneous review poses the possibility that an agency authority and
14 a court would issue conflicting rulings”).

15 Plaintiffs’ reliance on *Darby v. Cisneros*, 509 U.S. 137 (1993), for a contrary
16 conclusion is misplaced. *Darby* addressed whether a person aggrieved by an agency decision
17 was required to exhaust non-mandatory administrative remedies prior to seeking judicial
18 review. The Court concluded that a party is not required to exhaust where neither the relevant
19 statute nor agency rules required exhaustion. *Id.* at 154. The issue here, however, is not
20 whether Plaintiffs were required to exhaust prior to filing their case here, but rather, what
21 happens when the agency sua sponte reopens proceedings. As the agency decision-making
22 process here is on-going, *Darby* is inapposite.

23 *Doctors Nursing & Rehabilitation Center v. Sebelius*, 613 F.3d 672 (7th Cir. 2010), is
24 similarly distinguishable. There, the court held that an agency cannot destroy federal
25 jurisdiction by reopening a Medicare claim. *Id.* at 676. The case, however, was not decided
26 under the APA, but rather the judicial review provisions of the Social Security Administration

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28 Otherwise, this court and the IJ would both have been considering the same thing at the same
time: [petitioner’s] removal.” *Cordes v. Mukasey*, 517 F.3d 1094, 1095 (9th Cir. 2008).

1 set forth at 42 U.S.C. § 405(g). Notably, the *Sebelius* court expressly distinguished the
2 situation presented there from the jurisdictional issues which arise in the immigration context
3 citing *Gao v. Gonzales*, 464 F.3d 728 (7th Cir. 2006). *Id.* at 678. *Gao* holds that a federal
4 court lacks jurisdiction over a petition for review of a removal order when the agency reopens
5 the case while the petition is pending. *Sebelius*, 613 F.3d at 678.

6 Finally, the Court is also unpersuaded that 8 C.F.R. § 103.5(a)(5) renders Defendants'
7 decision final notwithstanding the March 28, 2013 Request for Evidence. Under section
8 103.5(a)(5), when Defendants reopen or reconsider a decision "in order to make a new
9 decision favorable to the affected party, [Defendants] shall combine the motion and the
10 favorable decision in one action." Plaintiffs argue that because this process was not followed,
11 it means Defendants are not going to grant the petition upon reconsideration and therefore the
12 earlier decision is still final. Section 103.5(a)(5), however, does not preclude Defendants
13 from asking for additional evidence before deciding whether to change course and grant a
14 petition, which they have done here. *See* 8 C.F.R. § 103.2(b)(8)(iii) (stating that if the initial
15 evidence submitted does not establish eligibility, the USCIS may "request more information
16 or evidence from the application or petitioner, to be submitted within a specified period of
17 time as determined by USCIS").

18 **B. Reopening Solely for the Purpose of Delay**

19 At oral argument and in their supplemental briefing, Plaintiffs argue that the Court
20 should overlook the jurisdictional issue because USCIS reopened proceedings solely for the
21 purpose of delay; in other words, it reopened the proceedings to deprive Plaintiffs of the
22 ability to obtain judicial review. Defendants' March 28, 2013 Request for Additional
23 Evidence is largely identical to the Request for Evidence issued during the pendency of the
24 underlying visa petition; however, it does seek an additional piece of evidence—Plaintiff
25 Jaric's college transcripts. (*Compare* Dkt. No. 1-3, p. 9 *with* Dkt. No. 13-1, p. 8.) Defendants
26 contend that this evidence is sought to clarify an inconsistency between Jaric's I-20 form
27 which was completed at the time she applied for her student visa and noted she was pursuing
28 a degree in fashion merchandising, and her degree noted on the underlying I-129 petition,

1 which was for business administration. Defendants, however, provide no explanation as to
2 why the third apparently identical request for additional evidence was issued on May 9, 2013.
3 (Dkt. No. 23-6.)

4 The Court concludes that the March 28, 2013 Request for Additional Evidence renders
5 Defendants' decision non-final and therefore not subject to review under the APA. This
6 result is warranted given that the March 28, 2013 Request does appear to seek additional
7 information. The two cases cited by Plaintiffs are inapposite. As discussed above, *Sebelius* is
8 a non-APA action which explicitly distinguished its holding from the jurisdictional issues
9 which arise in the immigration context. *Sebelius*, 613 F.3d at 678. Plaintiffs' reliance on,
10 *Chu Investment, Inc., v. Mukasey*, 256 F. App'x 935, 936 (9th Cir. 2007), is similarly
11 unhelpful. In *Chu*, the Court held that the agency's denial of Chu's I-140 application was
12 arbitrary under the APA. Chu had sought judicial review without first exhausting his
13 administrative remedies with the Administrative Appeals Office. The court noted that he was
14 not required to do so prior to seeking judicial review citing *Darby v. Cisneros*, 509 U.S. 137,
15 154 (1993). As noted above, the question here is not whether Plaintiffs were required to
16 exhaust, but whether the Court has jurisdiction when the agency reopens sua sponte. The
17 Court concludes that it does not have jurisdiction under these circumstances because there is
18 no longer a final agency decision to review.

19 The Court is not holding, however, that the May 9, 2013 Request—which appears
20 identical to the March 28 request—has the same effect as the March 28, 2013 Request.
21 Indeed, Defendants do not argue that it does so; instead, their supplemental brief focuses on
22 the new information sought by the March 28, 2013 Request.

23 CONCLUSION

24 Based on the foregoing, Defendant's motion to dismiss (Dkt. No. 13) is GRANTED
25 without prejudice. As suggested by Defendants, the Court shall retain jurisdiction over this
26 matter. See Dkt. No. 26 at 5. Within 20 days of receipt of a final agency decision, Plaintiffs
27 shall file an amended complaint or move to dismiss this action.

28 **IT IS SO ORDERED.**

United States District Court
Northern District of California

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2 Dated: June 20, 2013

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Jacqueline S. Corley
JACQUELINE SCOTT CORLEY
UNITED STATES MAGISTRATE JUDGE

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